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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 71

LUIS ALVARO CEBALLOS (Y ARBOLEDA),

Petitioner,

vs.

EDWARD J. SHAUGHNESSY, DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE AT THE PORT OF NEW YORK.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

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IN THE

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OCTOBER TERM, 1956

No. 71

LUIS ALVARO CEBALLOS (Y ARBOLEDA),

Petitioner,

vs.

EDWARD J. SHAUGHNESSY, District Director of the Immigration and Naturalization Service at the Port of New York,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

Opinions Below

The opinion of the Court of Appeals is reported in 229 F. 2d 592; a copy of the opinion and judgment is shown in this brief at page 17.

The opinion of the District Court is reported in 130 F. Supp. 30 and is incorporated in the Transcript of Record at pages 18 to 23.

Jurisdiction

The judgment of the Court of Appeals was rendered on February 6, 1956. The petition for a writ of certiorari was filed on April 28, 1956 and granted on June 11, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254(1).

Questions Presented

1. In a U. S. District Court suit to review the findings and order of the Immigration Service that the alien is not eligible to naturalization and therefore not eligible to suspension of deportation, and where he seeks to enjoin the District Director from deporting him, is the Attorney General and/or the Commissioner of Immigration indispensable parties or, is the District Director alone a sufficient party.

2. Whether an alien who claimed exemption from military service as a neutral in August, 1943 has forfeited the right to naturalization rendering him ineligible for suspension of deportation by the mere signing of an application for relief from military service (DSS Form 301), without being exempted or relieved from liability for such service as required by law and the rules and regulations of the Selective Service system (32 C. F. R. Cum. Supp. 1939-43) and section 3(a) of the Selective Training and Service Act of 1940.

Statutes Involved

The relative portions of the statutes involved are as follows:

Section 19(c) of the Immigration Act of 1917 as amended, 62 Stat. 1206, 8 U. S. C. 1946 Ed. Supp. V section 155 [now U. S. C. section 1254(a)(1)], provided in pertinent part:

> "In the case of any alien * * * who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may * * * (2) suspend deportation of such alien if he is not ineligible for naturalization * * * if he finds (a) that such deportation would result in serious economic detriment to a citizen * * * who is the spouse * * * or minor child of such deportable alien * * *."

Section 405(a) of the Immigration and Nationality Act of 1952, provides in part:

> "* * * An application for suspension of deportation under Section 19 of the Immigration Act of 1917 as amended, * * * which is pending on the date of enactment of this Act, shall be regarded as a proceeding within the meaning of this subsection * * *. Nothing in this Act * * * shall be construed to effect the validity of * * * any proceeding * * * which shall be valid at the time this Act shall take effect * * *."

Section 3(a) of the Selective Training and Service Act of 1940, 54 Stat. 885, as amended, 50 U. S. C. App. (1946 ed.) 303(a) [now 50 U. S. C. App. Sec. 454(a)] provided in part:

> "Except as otherwise provided in this Act, every male citizen and every other male person residing in the United States, who is between the ages of nineteen

and forty-five * * * shall be liable for training and service in the land and naval forces of the United States; *Provided,* That any citizen or subject of a neutral country shall be relieved from liability for training and service under this Act if, prior to his induction into the land or naval forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President; but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States * * *."

Section 405(b) of the Immigration and Nationality Act of 1952 provides:

"Except as otherwise specifically provided in Title III, (Nationality and Naturalization) any petition for naturalization heretofore filed which may be pending at the time this Act shall take effect, shall be heard and determined in accordance with the requirements of law in effect when such petition was filed."

Section 315 of the Immigration and Nationality Act of 1952, 66 Stat. 242, 8 U. S. C. Sec. 1426, provides:

"(a) Notwithstanding the provisions of section 405(b), any alien who applies or has applied for exemption or discharge from training or service in the Armed Forces or in the National Security Training Corps of the United States on the ground that he is an alien, *and is or was relieved or discharged* from such training or service on such ground, shall be permanently ineligible to become a citizen of the United States. (Emphasis added.)

(b) The records of the Selective Service System or of the National Military Establishment shall be conclusive as to whether an alien was relieved or discharged from such liability for training or service because he was an alien."

Section 101(a)(19) of the Immigration and Nationality Act of 1952, 66 Stat. 169, 8 U. S. C. 1101(a)(19), provides:

"(19) The term 'ineligible to citizenship', when used in reference to any individual, means, notwithstanding the provisions of any treaty relating to military service, an individual who is, or was at any time, permanently debarred from becoming a citizen of the United States under section 3(a) of the Selective Training and Service Act of 1940, as amended * * *."

Statement of the Case

Petitioner is an alien 42 years of age, a native of Columbia, S. A. who entered the United States for the first time on February 24, 1942 for permanent residence. He registered for the draft in May 1942 as required by the Selective Training and Service Act of 1940. On June 16, 1943 he filled out the prescribed questionnaire DSS Form 304, which was a personal history statement containing printed questions (R. 70, 91). In answer to one of those questions he stated "I do object to service in the land and naval forces of the United States" The word "do" was written in the petitioner's own handwriting (R. 35, 64). Within two months thereafter, he received DSS Form 301 entitled "Application by an Alien for Relief from Military Service". This he signed on August 26, 1943 and de-

livered it in person to his Board. DSS Form 301 contained the following paragraph:

> "I do hereby make application to be relieved from liability for training and service in the land or naval forces of the United States, under the Selective Training and Service Act of 1940, as amended, in accordance with the Act of Congress approved December 20, 1941. I understand that the making of this application to be relieved from such liability will debar me from becoming a citizen of the United States."

Petitioner never received notice of any action taken on his application DSS Form 301 and in fact, his selective service record discloses that he was never classified 4-C (exempt as a neutral alien) because of having executed the DSS Form 301. On the contrary, in January, 1944, the petitioner received notice from his Board that he had been classified 1-A and instructed to appear for pre-induction physical examination and he promptly and willingly appeared. After the examination he was rejected as physically unfit for service, due to a chronic kidney ailment and for that reason was reclassified in March, 1944 to 4-F (unfit for service). (R. 8, 11, 36, 61, 66).

Between his first entry in 1942 and his last re-entry on April 2, 1951, he had made several departures and re-entries. During one of the re-entries he was married in New York City on January 3, 1951 to a native born citizen of the United States (R. 29) and they promptly departed for France. On the said last re-entry April 2, 1951 he was in possession of a transit visa en route to Mexico. This kind of a visa permitted him to stay here only twenty-one days. Instead of departing within that time he decided to remain (R. 28).

Petitioner is the father of three children under six years of age and all born in New York City. He earns a substantial income and has purchased a home in New Rochelle, N. Y., where he lives with his wife and children and is their sole support. It is conceded that his deportation would cause serious economic detriment to them (R. 7, 74, 79).

Deportation proceedings were started against him on April 23, 1951 on the ground that he failed to depart within the time limit given him on his transit visa (R. 27). During the course of these proceedings he applied for suspension of deportation as he was privileged to do, under 8 U. S. C. Section 155(c), 1946 Ed. Supp. V. [Section 19(c) of the Immigration Act of 1917]. He sought this relief on the ground that deportation in his case would result in very serious economic hardship to his wife and children (R. 79). After several hearings and appeal to the Board of Immigration Appeals, he was found ineligible for naturalization and therefore not eligible for suspension of deportation in that, on August 26, 1943, while residing in the United States as a permanent resident, he claimed exemption from military service as a neutral alien (R. 70, 91).

In March, 1955 an action was begun in the United States District Court for the Southern District of New York against the District Director of the Immigration Service for a declaratory judgment declaring him to be eligible for suspension of deportation (R. 1, 12) and for a temporary injunction restraining the Director from taking him into custody for deportation (R. 6, 12). The government moved for dismissal of the complaint for failure to join the Attorney General and failure to state a cause of action (R. 13).

The District Court did not consider or rule upon the substantive issues. It dismissed the complaint exclusively on the ground "that the Attorney General of the United States and/or the Commissioner (of Immigration) are indispensable parties to the instant action" (R. 18). The Court of Appeals affirmed, although it conceded that in the light of this Court's decision in *Shaughnessy* v. *Pedreiro,* 349 U. S. 48 (1955), "the question is not free from doubt". The Court, nevertheless, adhered to the view that the Attorney General was a necessary party when suspension of deportation was involved. The Court of Appeals, in affirming the dismissal of petitioner's complaint for failure to state a cause of action (as well as for failure to join a necessary party) held that the mere making of the application for exemption as a neutral alien rendered petitioner ineligible to citizenship.

ARGUMENT

1. The Attorney General and/or the Commissioner of Immigration are not indispensable parties in this action.

This Court decided in *Shaughnessy* v. *Pedreiro,* 349 U. S. 48, that the District Director alone is a sufficient party in an action to review the validity of a deportation order, since he is the person who would execute the order and that neither the Attorney General nor the Commissioner are indispensable parties.

The Government's brief in opposition to the granting of certiorari, at page 10 under "Argument" states clearly that it does not rely upon that aspect of the decision below which holds that the Attorney General is a necessary

party to an action for a declaratory judgment seeking review of the denial of suspension of deportation and it does not agree with the decision below which holds that the Attorney General is a necessary party in this action.

2. Petitioner, not having been relieved of liability for military service as required by law and prescribed by Selective Service regulations, is not debarred from citizenship and is not ineligible for suspension of deportation.

The Court below held that petitioner was statutorily ineligible for suspension of deportation because it was of the opinion that the mere signing by petitioner of an Application to be Relieved from Military Service operated *ipso facto* to debar him from citizenship irrespective of whether or not he was thereafter relieved of liability for and exempted from such military service by reason of the said application.

Petitioner contends that the Court is in error, both under Section 3(a) of the Selective Training and Service Act of 1940 (50 U. S. C. App. 1946 Ed.) Sec. 303(a) and Sec. 315 of the Immigration and Nationality Act of 1952 (8 U. S. C. Sec. 1426). The law now is and at all times pertinent herein has been, that permanent ineligibility for citizenship results only when the two-fold factors exist: application for *and* relief from military service because of alienage. Since petitioner was never exempted from or relieved of liability from military service because of alienage the decision of the court below was error and should be reversed.

A. Application and relief from military service are both required as prescribed under Sec. 3(a) of the 1940 Selective Training and Service Act [50 U. S. C. App. (1946 Ed.) 303(a)] and the applicable Selective Service regulations, as a bar to naturalization.

Section 4, Act of July 1918 (40 Stat. 88) provided:

> "• • • a citizen or subject of a country neutral in the present war who has declared his intention to become a citizen of the United States shall be relieved from liability to military service upon his making a declaration, in accordance with such regulations as the President may prescribe, withdrawing his intention to become a citizen of the United States, • • • and he shall forever be debarred from becoming a citizen of the United States."

Since the adoption of the Selective Service Act of 1918, the law has made provision for the exemption from service and training in the United States armed forces of aliens, nationals of neutral nations, residing in the United States. The concomitant of exemption however, was perpetual debarment from United States citizenship. Court decisions early recognized that debarment from citizenship was a penalty for relief from liability for military service and that where no such relief was had, there existed no warrant for the exaction of the penalty. *In re Gustavson*, 300 F. 251, 252 (D. C. S. D. Calif., 1924) held:

> "The intention of the Act plainly was to fix a penalty where an alien declarant was relieved from military service; • • • in this case the government did not relieve the declarant from service, • • • hence no exemption right was accorded him and he should *not* be held to have incurred the penalty affixed."

Accord: *In re Siem*, 284 F. 868 (D. C. D. Mont., 1922), aff'd 299 F. 582 (C. C. A. 9th, 1924).

The authorities, construing subsequent legislation substituting the 1918 provision, have consistently understood that a debarment from citizenship may occur only where the two factors, in the conjunctive, appear: application for relief from military service and exemption under the application, by classification in the prescribed exempt category therefor in accordance with the statute and promulgated selective service regulations. In every case where a forfeiture of the right to citizenship was declared both factors were present. *Barreiro* v. *Brownell*, 215 F. 2d 585, 587 (C. A. 9th, 1954); *Benzian* v. *Goodwin*, 168 F. 2d 952, 954 (C. A. 2, 1948); *In re Ballester*, 119 F. Supp. 629, 631-2 (D. C. D. P. R., 1954); *Petition of Berini*, 112 F. Supp. 832, 838 (D. C. E. D. N. Y., 1953); *Petition of Miranda*, 111 F. Supp. 481 (D. C. E. D. N. Y., 1953); *In re Molo*, 107 F. Supp. 137 (D. C. S. D. N. Y., 1952); *Application of Mannerfrid*, 101 F. Supp. 446, 447 (D. C. S. D. N. Y., 1951); *In re Bartenbach*, 82 F. Supp. 649 (D. C. W. D. Pa., 1949); *Petition of Perez*, 81 F. Supp. 591 (D. C. E. D. N. Y., 1948). In no reported case was the penalty of debarment imposed where no relief from military service was granted.

The current law on the subject is now part of the Immigration and Nationality Act of 1952, Section 315 (8 U. S. C. Sec. 1426). It was put there because as reported by the Senate Judiciary Committee, it was felt "that this provision is in line with the general concept of the Nationality Act and should be incorporated in the proposed bill so that all requirements for naturalization may be found in the same Act." (Sen. Jud. Rep. No. 1515, 81st Congress 2nd Sess. p. 725.)

The legislative history of its enactment further reveals that Section 315 of the Immigration and Nationality Act of 1952, as written and adopted, was not intended to nor did it in fact constitute a change in the law as it had theretofore prevailed. On the contrary, it represented congressional understanding of the extant law. The committee, in recommending its passage, described it as embodying "the essential provisions of Section 4(a) of the Selective Service Act of 1948" (Sen. Jud. Rep. No. 1515, *supra*, p. 717). Indeed, Section 4(a) has remained on the statute books. It has not been repealed or replaced by Section 315 of the Immigration and Nationality Act of 1952; both provisions remain as companion statutes. And Section 4(a) was a re-enactment in *haec verbae* of Section 3(a) of the Selective Training and Service Act of 1940 [50 U. S. C. (1946 Ed.) App. 303 (a)] under which petitioner here had signed the application.

It is therefore significant that Section 315 of the Immigration and Nationality Act of 1952 is explicit in its incorporation of both factors—application and relief—in the conjunctive: "any alien who applies or has applied for exemption * * * on the ground that he is an alien, and is or was relieved * * * on such ground, shall be permanently ineligible to become a citizen of the United States." This law has been construed in a manner warranted by its clearly expressed language.

Two conditions are requisite: the application for exemption and a record that he was relieved or discharged from training or service. These requisites are not stated in the disjunctive, and if either fails, the statutory ineligibility does not become automatic, for one is of equal importance to the other (*Petition of Caputo*, 118 F. Supp. 870, 871, D. C. E. D. N. Y., 1954).

It must consequently follow that former Section 3(a) now Section 4(a) of the Selective Service Act and Regulations also requires as a condition for forfeiture of eligibility for naturalization both application and exemption. Otherwise Section 4(a) Selective Service and Section 315 Immigration and Nationality Act of 1952 are in conflict and incompatible.

The petitioner did sign DSS Form 301, application by alien for relief from military service. However, he was never classified as exempt or granted relief from military service and training as a consequence of the execution of this application form. That he was not relieved from service by virtue of his alienage cannot be disputed.

The regulations operative at the time the petitioner signed DSS Form 301 established a specific *modus operandi* to effect, under the selective service law, an alien's exemption from military service because of alienage. Section 622.43(b) of 32 C. F. R. (Cum. Supp., 1943) provided that an alien registrant of a neutral country who files a DSS Form 301 with his local board "shall be placed in Clas IV-C" (exempted and relieved). Section 623.1 of the regulations, prescribed prompt classification of a registrant in accordance with stated principles. Section 623.61 made mandatory the mailing to the registrant of notice of his classification and the proper recording in the Selective Service files of such classification. Not until all of these steps had been completed was the alien classified as exempt and exempted. Until the completion of the prescribed classification procedure his liability for service and training remained unimpaired.

None of the specified steps leading to exemption were taken with respect to the DSS Form 301 signed by the

petitioner. He was at no time classified IV-C (exempted and relieved). The Selective Service files do not record or in any way reflect a IV-C classification; no notice by mail or otherwise of a IV-C classification was sent to petitioner; and finally, the Selective Service files do not record the mailing of any such notice to petitioner (R. 11).

Quite the contrary, on January 27, 1944, five months after petitioner signed the DSS Form 301 he was classified 1-A— available for military service— notified of the classification and directed to appear for pre-induction physical examination on a date certain. The Selective Service files duly record this 1-A classification and the mailing of notice of that classification. The petitioner accepted the classification and appeared, as ordered, for physical examination. Only his failure to meet the physical requirements of the armed forces prevented him from serving and resulted in his reclassification as IV-F (R. 62) (physically defective). The IV-F reclassification was made by the Board on March 2, 1944. Again, this reclassification with appropriate notice to appellant is duly recorded in the Selective Service files.

Sec. 315(b) of the 1952 Immigration and Nationality Act makes the records of the Selective Service System "conclusive as to whether an alien was relieved or discharged from such liability for training or service because he was an alien."

B. Petitioner is eligible for naturalization under the present statute Sec. 315 of the Immigration and Nationality Act of 1952 (8 U. S. C. Sec. 1426).

It is submitted that petitioner is not ineligible for naturalization by reason of having signed Selective Service

DSS Form 301. The applicable statute is Section 315 of the 1952 Immigration and Nationality Act (8 U. S. C. Sec. 1426). Subdivision (a) thereof reads as follows:

> "* * * any alien who applies or has applied for exemption or discharge from training or service in the Armed Forces of or in the National Security Training Corps of the United States on the ground that he is an alien, *and is or was relieved or discharged* from such training or service on such ground, shall be permanently ineligible to become a citizen of the United States." (Emphasis added.)

The emphasized language in the aforesaid statute highlights that its provisions—and they alone—are to be determinative of the eligibility for naturalization of any alien where eligibility is in issue because of an application made at any time for exemption from military service on the ground of alienage.

The Court of Appeals for the District of Columbia in a case decided December 1, 1955, so construed and applied this section in *United States* v. *Bazan*, 228 F. 2d 455. In that case Bazan was applying for naturalization. It appeared that in November, 1942, he had filed under Section 3(a) of Selective Training and Service Act of 1940, Selective Service Application DSS Form 301 claiming exemption from service as a neutral alien. He had sought to withdraw this application in September, 1943, but the Selective Service refused to permit it. Apparently there was no evidence in the record before the court that he had been relieved from military service because of his application. On these facts the Court of Appeals ruled that he was not ineligible for citizenship and stated:

"* * * to debar appellee (Bazan) from citizenship, the statute requires proof not only that he applied for exemption on grounds of alienage but also that he was *relieved from serving* for that reason. The examiner's legal conclusion that appellee was relieved from 'military service because of alienage' is not supported by any evidence in the present record; * * * We think the total absence of any such essential evidence is a sufficient basis for affirming the District Court's order granting naturalization." (Italics added.)

In the case at bar the record not only establishes that petitioner was "not relieved from military service because of alienage" but affirmatively shows that he was in fact classified I-A, held liable and called up for service.

Under the decision in the *Bazan* case the petitioner could not be held ineligible for citizenship because of signing DSS Form 301. This is in direct conflict with the holding of the court below.

CONCLUSION

For the reasons stated above and because the questions raised are of great importance to a large number of aliens residing here, the order of the United States Court of Appeals for the Second Circuit and of the District Court, dismissing the petitioner's complaint should be reversed.

Respectfully submitted,

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Opinion.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

(No. 130—OCTOBER TERM, 1955.)

(Argued January 19, 1956 Decided February 6, 1956)

Docket No. 23721

LUIS ALVARO CEBALLOS (Y ARBOLEDA),

Plaintiff-Appellant,

v.

EDWARD J. SHAUGHNESSY, District Director of Immigration and Naturalization at the Port of New York,

Defendant-Appellee.

Before: MEDINA, HINCKS and WATERMAN, Circuit Judges.

Appeal from a decision and order of the District Court of the United States for the Southern District of New York. Irving R. Kaufman, *Judge*.

Plaintiff appeals from the District Court's dismissal of his complaint for failure to join an indispensable party. Opinion reported in 130 F. Supp. 30. Affirmed.

Opinion.

MEDINA, Circuit Judge:

Plaintiff, an alien, seeks *inter alia* a declaratory judgment that he is not ineligible for naturalization under 8 U. S. C. A. § 155(c) (1950 Cum. Pocket Part) and, in effect, a stay of deportation until the Attorney General exercises his discretion with respect to plaintiff's application for suspension of deportation. The complaint, brought against the District Director of Immigration, was dismissed below on the procedural ground that the Attorney General or the Commissioner of Immigration and Naturalization was an indispensable party.

Judge Kaufman followed and elaborated upon the distinction we made in *Pedreiro* v. *Shaughnessy*, 2 Cir., 213 F. 2d 768, aff'd 349 U. S. 48, between a challenge to deportability, as in *Pedreiro*, and a claim that, notwithstanding deportability, the Attorney General should exercise his discretion in favor of the issuance of an order suspending deportation, as in *Vaz* v. *Shaughnessy*, 2 Cir., 208 F. 2d 70 and in the case now before us. Although the question is not free from doubt, we shall follow our reasoning in *Vaz* and more fully stated in the opinion below. While the Supreme Court may decide that the distinction no longer holds, we do not think this is to be spelled out of Mr. Justice Black's opinion in *Pedreiro*.

In any event, the decision below must be affirmed because, as a matter of law, plaintiff is not entitled to the relief he requests. For 8 U. S. C. A. § 155 (c) (1950 Pocket Part) permits his application for suspension of deportation to be considered only if he is eligible for citizenship. Plaintiff, however, admits that he signed a

DSS Form 301: Application by Alien for Relief from Military Service. Plaintiff heard nothing further from his Draft Board until his country of citizenship became a belligerent and he was, consequently, no longer entitled to claim exemption as a neutral alien. Whether this was cause or coincidence, as the defendant and plaintiff respectively contend, is not material. Section 303(a) of Title 50 of the United States Code, Appendix, provides that an alien who "has made application" to be relieved from military service "shall thereafter be debarred from becoming a citizen of the United States," and plaintiff made such an application and hence is not eligible for an order suspending deportation.

Affirmed.

Judgment.

(Filed—February 6, 1956)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 6th day of February, one thousand nine hundred and fifty-six.

Present: HON. HAROLD R. MEDINA,
HON. CARROLL C. HINCKS,
HON. STERRY R. WATERMAN,
Circuit Judges.

LUIS ALVARO CEBALLOS (y ARBOLEDA),
Plaintiff-Appellant,

vs.

EDWARD J. SHAUGHNESSY, District Director, etc.,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

/s/ A. DANIEL FUSARO,
Clerk.